IN THE

Supreme Court of the United States

October Term, 1960

No. .....

RAPHAEL KONIGSBERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF.

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"I had no hesitation in answering . . . that the bar ought, in my opinion, to be independent and impartial, at all times and in every circumstance . . . and that every lawyer must hold himself responsible not only to his country, but to the highest and most infallible of all tribunals, for the part he should act."

—John Adams

"The Selected Writings of
John Quincy Adams"
Knopf, New York, 1946, p. 29

"Through many channels I came to learn the noble history of the profession of law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories or individual liberty would cease to be a living reality."

—Henry L. Stimson

"On Active Service in Peace and War."
Stimson & Bundy, Introduction by
Mr. Stimson, p. XXI-XXII

"A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone not only destroys the whole, but gives the strand itself a false value."

—Learned Hand
317 U. S. XI-XVI

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The undersigned respectfully move this Honorable Court for leave to file brief amici curiae in this case. This brief is submitted in support of the petitioner herein, from whom consent for the filing of this brief has been obtained. The respondent, however, has refused to consent, taking the position that this Honorable Court should determine whether or not this brief should be filed and considered.

This amici brief is submitted on behalf of a group of California attorneys who are vitally concerned with

the effect the decision in this case will have upon the independence of the bar. The brief which it is proposed to file deals with that question from the viewpoint of the bar and the general public rather than from the approach properly taken by the petitioner in arguing his own case. The individuals on whose behalf this motion is made believe that in arriving at a decision the Court should give the most thorough consideration to the impact of what the Court says and does upon the maintenance of a free, courageous and truly independent bar not only in the State of California but throughout the land.

Respectfully submitted,

By ROBERT W. KENNY,

For Attorneys Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

RAPHAEL KONIGSBERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA,

Respondent.

BRIEF AMICI CURIAE IN UNITED STATES SUPREME COURT:

The signers of this brief are all members of the California Bar. We are deeply concerned with the necessity that the State examine carefully, indeed zealously, into the character and the qualifications of every applicant for membership in the Bar, for we deem the responsibilities of an attorney to be far above those of most members of society.

We are equally concerned, however, that the State, in its dealings with applicants for admission to the Bar, as well as with other persons, adhere scrupulously to the standards of fairness required by the Constitutional guarantees of due process and equal protection of the laws. Neither the Bar, nor the State acting through the organized Bar of California may, in our view, arrogate

to itself the right, in a particular instance, to overrule the "law of the case" as set down by the United States Supreme Court, or to make *ad hoc* "rules" without the sanction of law.[1]

We do not feel that lawyers are entitled to any special privileges. However, it is from us, as a class, that there have always come those who stand as defenders, under the law, between the individual and the oppressions to which society is sometimes heir.

The best tradition of our profession was quietly but eloquently summarized by one who best exemplified it:

> "Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a Bar trained in the traditions of courage and loyalty, our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing constitutions and bills of rights similar to our own, whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American lawyer should regard himself as a potential officer of his government and as a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed."

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[1] On Active Service in Peace and War. Stimson & Bundy Introduction by Mr. Stimson, Page XXI-XXII.

Our State of California has embodied this same approach to the lawyers' responsibility in our law which commands each of us

> ". . . never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[2]

This Court has pointed out, with approval, that

> "The public has almost as deep an interest in the independence of the bar as of the bench."[3]

This Court has said in this very case,

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an independent Bar."[4]

We cherish this right for ourselves—and we are strong in our belief that it should not be denied to those who would become members of the Bar. To deny this right to them is as unconstitutional as it would be to deny it to us.

What is the difference between what this Court has already found and decided in this case and what the Committee of the Bar Examiners and the majority of the California Supreme Court rely upon as valid grounds for denying petitioner the right to practise law? It is this and only this: In the 1953-54 hearings the Com-

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[2] B & P Code, §6068(H).

[3] *Cammer v. United States*, 350 U. S. 399, 407.

[4] 353 U. S. 252, 273.

mittee asked Konigsberg whether he was then or ever had been a member of the Communist Party, but did not tell him that his refusal to answer would, in and of itself, be sufficient reason to deny him admission to the Bar.[5]

In the 1957 hearing, after this Court had remanded the case to the California Supreme Court "for further proceedings not inconsistent with this opinion" and the California Supreme Court, by a divided vote, referred the case back to the State Bar for further proceeding, the State Bar, through its Committee of Bar Examiners, held a hearing[6] and at this hearing the Committee this time told Konigsberg that if he failed to answer questions (the same questions that he had declined to answer at the previous hearing) about Communist Party membership he could be denied admission to the Bar. Konigsberg again refused to answer such questions, stating that his refusal was grounded upon the same Constitutional and principled reasons which this Court had found to be neither frivolous nor taken in anything but good faith. On this ground and this ground alone he was refused admission to the Bar, although the Cali-

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[5]It is obvious that the Bar Committee itself did not consider this, in and of itself, to be sufficient reason for such action for, as this Court pointed out,

> "In presenting its version of the questions before this Court, the Bar Committee did not suggest that the denial of Konigsberg's application could be upheld merely because he had failed to answer questions. Nor was such a position taken on oral argument. Counsel, instead, reiterated what the Bar Committee had contended throughout, namely, that Konigsberg was rejected because he failed to dispel substantial doubts raised by the evidence in the record about his character and loyalty." (353 U. S. 252, 261.)

[6]Judge Peters of the California Supreme Court called this "a so-called hearing." (52 Cal. 2d 764, 779.)

fornia Supreme Court points out, "The Committee action now before us contains no finding or conclusion that petitioner had failed to establish either his good moral character or his abstention from advocacy of overthrow of the Government."[7] (*Konigsberg v. State Bar*, 52 Cal. 2d 769, 772.)

To what lengths of obeisance must a man go, whose good moral character has been affirmatively certified to by the United States Supreme Court on the basis of a full record of his life's activities, in order to satisfy a committee of the Bar that he is qualified to practise law? As pointed out in the petition for a writ of certiorari, Konigsberg told the Committee in the 1957 hearing that he had declined to answer similar questions on grounds of moral principle at the previous hearings and that he "could hardly be expected at this point for expediency to give up principles that have been upheld by the highest court of our country."

When Konigsberg applied for admission to the Bar there was, as this Court pointed out, "nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry, is *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or

[7] And also, as we have pointed out above, that, "Thus, a finding that he was not of good moral character or that he advocated overthrow of the Government would be inconsistent with the decision of the United States Supreme Court upon the previous record." (52 Cal. 2d 769, 771-2.) Further, even the question of treating advocacy of force and violence as a disqualification was itself reserved by the United States Supreme Court in the first *Konigsberg* decision, 353 U. S. 252, 273, fn. 35.

loyalty or how flimsy are the suspicions of the Bar Examiners.[8] There is still nothing in the California statutes or the Rules of the Bar Committee or the California decisions (except the California Supreme Court decision here under review) which makes such failure, *ipso facto*, a basis for excluding an applicant from the Bar.

To conjure up such a rule or dictum by fiat of the Bar Committee designed for this particular case, four years after applicant had applied for admission to the Bar and after the United States Supreme Court had reversed the Bar Committee's action in excluding him, violates every element of fair play which due process and equal protection call for. Rules cannot be made up as a tribunal goes along to meet individual cases any more than established rules can be changed one-sidedly by administrative or governmental fiat to make it easier for a governmental or quasi-governmental body to meet the exigencies of a particular situation. As Mr. Justice (then Professor) Frankfurter said, in the view adopted by the Court in *Colyer v. Skeffington*:[9]

> "Now if there is one thing that is established in the law of administration, I take it that it is that a rule cannot be repealed specifically to affect a case under consideration by the administrative authorities; that is, if there is an existing rule which protects certain rights, it violates every sense of decency, which is the very heart of due process, to repeal that protection, just for the purpose of accomplishing the ends of the case which come before the administrative authority."

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[8] *Konigsberg v. State Bar*, 353 U. S. 252, 260.

[9] *Colyer v. Skeffington*, 265 Fed. 17, 48.

That is precisely what has been done here by the Bar Committee and approved by the California Supreme Court—and without even making a rule of general application. Just as was held in the *Colyer* case, *supra*, the improvisation by the Committee here of a "rule" which had never previously existed by California statute, decision or Bar Committee Rule "for the purpose of accomplishing the ends of the case", *i.e.*, barring this applicant from admission to the Bar, "violates every sense of decency which is the heart of due process."

The "evidence" upon which the Bar Committee relied in the 1953 hearing has been characterized by this Court as "the suspicions which apparently were the basis for the Committee's actions".[10]

But this Court went even much further, affirmatively, in disposing of the issue of past Communist Party membership, when it summed up its conclusions by saying:

> "As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action."[11]

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[10] 353 U. S. 252 at 274. This Court, at pages 266-268 deals fully with this so-called "evidence" (including the acknowledgment of Counsel for the Bar Committee on oral argument that "Mrs. Bennett's testimony left much to be desired, that I concede. Her identification of this man is not all that you might wish.") and we need not repeat that here.

[11] 353 U. S. 252, 273-274.

In these words the Court recognized the great validity of Learned Hand's deeply perceptive words which we set forth at the opening of this Brief and which we repeat at this point:

> "A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone not only destroys the whole, but gives the strand itself a false value."[12]

The Committee of Bar Examiners has had before it, in this case, not once but twice a full picture of the many interwoven strands which make up the tapestry of the life of this applicant for admission to the Bar. Its specific determination in the first (1953) hearing that the applicant had not sustained the burden of proving that (1) he was possessed of good moral character or (2) that he did not advocate the overthrow of the Government of the United States or the State of California by force, violence or other unconstitutional ground *was specifically reversed* by this Court.[13]

At the second (1957) hearing, it appeared that the Committee had, since the first hearing, admittedly employed an independent investigator to investigate Konigsberg. Since it did not produce this investigator, it can, and indeed must, be presumed that he had found no additional evidence to support its "suspicions" which this Court found insufficient to support its previous

[12] 317 U. S. XI-XVI.

[13] "In this case, we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government." (353 U. S. 252, 273.)

conclusion. The Committee, in fact, produced no additional evidence of any sort whatever and it must therefore be concluded that it had none.

The Committee, composed of men skilled in the law, must then have known that to ask Konigsberg again the very same questions which he had refused to answer previously on principled and constitutional grounds could call forth from Konigsberg only one of two responses —either a reaffirmation of what this Court found to be his principled refusal to answer or an abject abandonment of his principles under the pressure of the Committee's warning that it would refuse to certify him unless he knuckled under and sacrificed his conscience to expediency.

Thus, in complete disregard of what Learned Hand has called "the hallowed phrases"[14] of the First and Fifth Amendment[15] the Committee required Konigsberg either to surrender what this Court has accepted as his deeply held principle bottomed on his honest belief in the meaning of the Constitution of the United States or to cling to his principle and be denied the right to practise the profession for which he had been trained.

The Committee's present (and persistent) refusal to certify the applicant for admission is now based upon its assertion that his refusal "to answer said questions (concerning past or present membership in or affiliation with the Communist Party) has obstructed a proper and complete investigation of Applicant's qualifica-

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[14] "A Plea For the Open Mind and Free Discussion" in "The Spirit of Liberty" Papers and Addresses of Learned Hand, edited by Irving Dillars, Vantage Books, 1959, page 210.

[15] It should be noted, of course that at no time did Konigsberg claim for himself the privilege of the Fifth Amendment, but, on Constitutional grounds, relied entirely on the First Amendment.

tion for admission to practise law in the State of California."

Can it be truly said that to have answered such question would have enabled the Committee to determine whether or not this applicant is a person who advocates the overthrow of the Government of the United States or the State of California by force, violence or other unconstitutional means? This Court has specifically found, after examining the entire record *including Konigsberg's refusal to answer these very questions*, that evidence which the State offered to prove that he advocated overthrow of the Government by force and violence, "To the contrary . . . manifests a strongly held conviction for our constitutional system of government."[16] Indeed, this Court made an overall finding that there was no evidence in the record which "rationally justifies a finding that Konigsberg . . . failed to show that he did not advocate the forceful overthrow of the Government."

Can it be said that to have answered such question under such circumstances would have enabled the Committee to determine whether to certify, as apparently it now "is unable to certify" that Konigsberg "possesses the requisite qualifications" of good moral character to be entitled to practise law in California, when this Court has already found, in the face of the very same

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[16] 353 U. S. 252, 272. This Court also found that "certainly there is nothing in the newspaper editorials that Konigsberg wrote that tends to support a finding that he champions violent overthrow. Instead, *the editorials expressed hostility to such a doctrine.*" (Emphasis supplied.) The Court pointed out that Konigsberg had written: "'It is vehemently asserted that advocacy of force and violence is a danger to the American government and that its proponents should be punished. With this I agree. Such advocacy is un-American and does undermine our democratic processes. Those who preach it must be punished."

refusal, that there was no evidence in the record which "rationally, justifies a finding that Konigsberg failed to establish his good moral character"? Certainly there could be no greater indictment of the character of this or any other man than a willingness to sacrifice his principle in the interest of his immediate goal of admission to the Bar. Even one of the members of the Committee in the original hearing was impelled to say of applicant, "*I commend his moral principle*, let me say, but perhaps have a little doubt for his judgment."[17] Would an abandonment of his moral principle make Konigsberg a better, fitter man to be admitted to join our profession? Does the "noble tradition of the bar" of which Mr. Stimson spoke call for men ready to abandon their principle in the face of threat or does it call for men with the moral fibre to cling steadfastly to that principle, no matter what the personal sacrifice? "If I would but go to hell for an eternal moment or so, I could be knighted."[18] Is this what is demanded for admission to the Bar?

We do not ask these questions in the spirit of academic philosophical abstraction. We ask them because we feel that they go to the very heart of the constitutional question involved here.

The Constitution is not merely a set of guiding "legal" rules according to which our institutions and our people may govern and be governed. It is, in truth, a great and solemn covenant among men which embodies deep moral principles. "Due process of law," "equal protection of the laws", "freedom of speech, of press, of religion, of thought"—these and other "hallowed phrases"

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[17]353 U. S. 252, 300.

[18]Shakespeare—The Merrie Wives of Windsor.

which stem from the Bill of Rights are the expression of basic truths according to which men must live in relationship to one another in a society which recognizes the dignity, indeed the divinity, of individual man and defends it from the excesses of group-man, society. It is our recognition of the necessity for such individual freedoms as are embodied in our Constitution which permits man's spirit to flourish in a society like ours in contrast to those societies which deny such rights to the individual.

A perceptive statement of the late Profession Zachariah Chafee of Harvard Law School has recently come to our attention. It summed up in one short sentence the essence of the basic principle which underlies the Constitutional doctrines of which we speak. We cannot all speak with the assurance which Professor Chafee possessed, not only of family antecedents but of long established position. But we can agree that the statement he made to the Harvard Board of Overseers concerning the *Abrams* case[19] was indeed "a wonderful avowal of faith"—"a concentrated expression of devotion without rhetoric".[20] Prof. Chafee said:

> "I come of a family that have been in America from the beginning of time. My people have been business people for generations. My people have been people of substance. They have made money. My family is a family that has money. I believe in property and I believe in making money, but I want my crowd to fight fair."[21]

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[19] *Abrams*, 250 U. S. 616.

[20] "Felix Frankfurter Reminisces," Reynal & Co., New York, 1960, page 177.

[21] *Id.*

We need not be concerned here with the "far reaching and complex questions relating to freedom of speech press and assembly" which this Court felt it would have been compelled to decide if the Bar Committee had in the first instance "barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest". The constitutional question *in limine* is whether this applicant has been denied the elementary *fairness* which constitutes due process and equal protection.

We, the signers of this brief, members of the California Bar, submit that Raphael Konigsberg, pursuant to the decision of this Court, is entitled to admission to the California Bar.

Respectfully submitted,

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